

VIRGINIA PETROLEUM STORAGE TANK FUND THIRD PARTY DISBURSEMENTS GUIDELINES

Under State Water Control Law, disbursements from the Virginia Petroleum Storage Tank Fund (VPSTF or the Fund) may be made for costs incurred by owners and operators of eligible underground storage tanks (USTs) to compensate third parties for the reasonable and necessary costs of settlements and judgments for bodily injury and property damage caused by accidental releases of petroleum from the USTs. The Virginia Department of Environmental Quality (DEQ or the Agency) administers the Fund on behalf of the State Water Control Board (Board). The following guidelines summarize the applicable statutes, regulations, procedures and interpretations of the Board used to evaluate third party claims.

I. Authority

Virginia Code § 62.1-44.34:11.A.2.b. allows disbursements from the Fund for:

Reasonable and necessary per occurrence costs incurred for releases reported after December 22, 1989, by the owner or operator who is the responsible person for compensating third parties, including payment of judgments for bodily injury and property damage caused by the release of petroleum into the environment from an underground storage tank, which are in excess of the per occurrence financial responsibility requirement imposed by § 62.1-44.34:12, up to one million dollars.

II. Definitions

The definitions contained in Articles 9, 10 and 11 of State Water Control Law and Virginia Petroleum Underground Storage Tank Financial Responsibility Regulation 9 VAC 25-590-10 et seq. apply to this guidance. The following definition also applies:

"Corrective action" means all actions necessary to abate, contain and clean up a release from an UST system to mitigate the public health or environmental threat from such releases and to rehabilitate state waters. Corrective action for an UST system must be conducted in accordance with Parts V and VI of 9 VAC 25-580-10 et seq. This term includes the provision of an alternate water supply and actions necessary to abate, contain and clean up a release conducted on the property of a third party who is neither the owner nor the operator of the leaking UST system. The term does not include those actions normally associated with closure or change in service as set out in Part VII of 9 VAC 25-580-10 et seq. or the replacement of an UST system.

III. Tank Type Eligibility

The following table identifies eligible costs and their limitation as established in Virginia Code §§ 62.1-44.34:11.A.2.a through e for third party liability disbursements from the Fund based on the tank type involved.

TANK TYPE	Eligible Cost Categories	
	Cleanup costs that exceed the applicable Financial Responsibility Requirement and <u>third party costs</u> that exceed the applicable Financial Responsibility Requirement up to a combined maximum of \$1 million per occurrence	Cleanup costs (<u>but NO third party costs</u>) that exceed the Financial Responsibility Requirement up to a maximum of \$1 million per occurrence
Regulated UST	X	
Excluded UST	X	
Deferred UST	X	
Partially Deferred UST	X	
Exempt USTs 1 & 2		X
Regulated AST Facility		X
Unregulated AST Facility		X
Home Heating Oil AST		X

Pursuant to Virginia Code §§ 62.1-44.34:11.A.2.a through e disbursements from the Fund for eligible corrective action and third party claim costs incurred by owners/operators may be made only for those costs incurred which are in excess of the owner/operator financial responsibility requirement(s) up to a maximum of \$1 million per occurrence. Under Virginia Code § 62.1-44.34:12, the financial responsibility requirement for regulated, excluded, deferred and partially deferred USTs is determined according to a sliding scale based on annual throughput of petroleum products for **all** regulated tanks owned and operated in Virginia for the year prior to the date of the release report to DEQ. The sliding scale is as follows:

Annual Throughput (Gallons)	Corrective Action Financial Responsibility Requirement Per Occurrence	Third Party Liability Financial Responsibility Requirement Per Occurrence	Annual Aggregate For Demonstration
600,000 or less	\$5,000	\$15,000	\$20,000
600,001 - 1.2M	\$10,000	\$30,000	\$40,000
1,200,001 - 1.8M	\$20,000	\$60,000	\$80,000
1,800,001 - 2.4M	\$30,000	\$120,000	\$150,000
Above 2.4M	\$50,000	\$150,000	\$200,000

IV. Persons Eligible For Disbursement

Third party claims disbursement requests can be approved only for the owner/operator who has been determined by DEQ to be the responsible person for the release occurrence. Third parties must assert their claims directly against the owner/operator. DEQ will not accept nor be bound by any assignment of the right to disbursement for third party claims from the owner/operator to any other person, including the third party.

V. Fund Priorities

Pursuant to Virginia Code § 62.1-44.34:11.A.10, the Fund balance shall be maintained at a level sufficient to ensure that the Fund can serve as a financial responsibility demonstration mechanism for owners and operators of underground storage tanks and provide the means for the State Water Control Board to administer the programs authorized by Articles 9, 10 and 11 of State Water Control Law. Approved third party claims may not be paid unless the Fund balance is sufficient to ensure the Fund's financial responsibility demonstration function is met and to ensure the Fund's ability to meet administrative expenses. Pursuant to Virginia Code Section 62.1-44.34:11.A.2.b and Virginia Regulation 9 VAC 25-590-210, third party claims shall be subordinate to any corrective action claims on an occurrence basis, but may be paid prior to corrective action claims of other occurrences. This means that third party claims will not be eligible for payment until all corrective action costs for the occurrence have been paid.

Total corrective action costs include but are not limited to the amount approved for corrective action reimbursement to the owner/operator and corrective action costs incurred by the Commonwealth for the occurrence (State Lead costs). State Lead costs include without limitation investigation and remediation costs and alternate water supply costs.

VI. Eligibility of Costs for Disbursement from the Fund

To obtain disbursement from the Fund, the owner/operator must demonstrate that the requested costs are reasonable and necessary and actually have been incurred¹. It is the responsibility of the owner/operator to provide evidence to support such a finding.

Eligible costs include:

A. Reasonable and necessary costs, otherwise eligible for disbursement, incurred by the owner or operator, on or after December 22, 1989 in compensating third parties for bodily injury or property damage proximately caused by a release from an owner's/operator's eligible tank. See Virginia Code § 62.1-44.34:11.A.2.b.

B. Costs incurred by owners/operators in compensating third parties for bodily injury proximately caused by a release from an owner's/operator's eligible tank, which are eligible for disbursement from the Fund include the following:

¹DEQ will deem a contract to pay a cost, such as a settlement agreement, to be proof that the cost actually has been incurred.

- Actual medical expenses,
- Actual future medical expenses (present value),
- Loss of use or disability,
- Lost earnings caused by bodily injury,
- Lost earnings caused by bodily injury resulting in death, and
- Funeral expenses.

C. Costs incurred by owners/operators, in compensating third parties for real property damage proximately caused by a release from an owner's/operator's eligible tank, which are eligible for disbursement from the Fund include the following:

1. For temporary damage to real property, the decrease in rental value during the continuance of the injury, and
2. For permanent damage to real property, the lower of (I) the diminution in the value of the real property and fixtures (as determined after completion of corrective action) or (ii) the cost to restore the real property to its condition prior to the injury.

D. Actual Relocation Costs:

- Rent/lodging,
- Utilities at contaminated residence,
- Reconnection fees for utilities whose operation has been discontinued at contaminated residence,
- Connection fees for utilities at relocation residence,
- Moving costs paid to one other than third party or immediate family member of third party,
- Additional food and transportation costs necessitated by the move,
- Pet boarding costs necessitated by move, and
- Renter's insurance on relocation residence.

E. Costs incurred by owners/operators, in compensating third parties for personal property damage proximately caused by a release from an owner's/operator's eligible tank, which are eligible for disbursement from the Fund include the following:

1. For damaged personal property, the lower of (I) the reasonable cost of repair or (ii) the difference in fair market value before and after the injury; and compensation for loss of use, and
2. For destroyed personal property, the fair market value of the property at the time of its destruction.

F. Lost net profits

VII. Ineligible Costs

Funds will not be disbursed in those circumstances prohibited by 9 VAC 25-590-210.

Funds may not be disbursed for third party bodily injury or property damage costs if the owner or operator is not liable therefor as a matter of fact or law. To the extent that recovery by a third party against an owner or operator is limited by law, disbursements from the Fund may not exceed the amount for which the owner/operator is liable under the law.

Claims for diminution in property value are not eligible for property on which no contamination was found, nor where the third party did not sustain an actual loss. Examples of actual loss include but are not limited to the following: (1) the sale of the third party's property where fair market value was not obtained due to the presence of the petroleum contamination; (2) denial of financing where the third party's property was offered as collateral if the denial was caused by the presence of the petroleum contamination; or (3) incurrence of costs to address remaining petroleum contamination on the third party's property after site closure for property development purposes.

The term bodily injury does not include those liabilities which, consistent with standard insurance industry practices, are excluded from coverage in liability insurance policies for bodily injury. Accordingly, costs relating to bodily injury covered by such exclusions are not eligible for disbursement.

Ineligible third party liability costs include but are not limited to the following:

- A. All costs incurred for releases reported before December 22, 1989.
- B. Costs incurred before December 22, 1989 regardless of release report date.
- C. Costs covered by insurance of the owner/operator or third party.
- D. Damages not proximately caused by a confirmed release from an eligible tank owned/operated by an eligible owner.
- E. Damages resulting from any UST release caused by the negligence or willful misconduct of the UST owner/operator or its employee, agent or contractor.
- F. Penalties, charges, and fines.
- G. Attorney's fees.
- H. Damages to the UST owner/operator or its employee, agent or contractor.
- I. Owner/operator's liability under Workers Compensation, unemployment compensation, disability

benefits or similar law, and liabilities assumed by the owner/operator under contract.

J. Punitive, exemplary, noneconomic and multiple compensatory damages.

K. Costs defined as corrective action.

L. Damages arising out of a violation of Federal or state anti-competition, antitrust, racketeering and corrupt organization, or similar law. DEQ will withhold payment of the third party claim pending disposition of any charges or potential charges of this nature.

M. Costs for subjective or non-physically manifested damage components and indirect damages including but not limited to the following:

- Pain and Suffering,

- Mental distress,

- Loss of Consortium and/or Services,

- Psychological Injuries,

- Hedonic damages, and

- Inconvenience.

N. Intangible property damage costs including but not limited to loss of goodwill.

O. The following relocation costs:

- Deposits on relocation residence and utilities at relocation residence,

- Real property taxes for contaminated residence, and

- Homeowner's or renter's insurance for the contaminated residence.

P. Damages caused by the third party's failure to mitigate, including, but not limited to, failure to provide site access for corrective action.

Q. Damages awarded in a final court order or agreed to in a settlement where the owner/operator has failed to vigorously defend.

R. Interest.

VIII. Establishing Liability

The Agency's acquiescence to a settlement between owner and third party does not mean that the Agency will pay the full settlement amount. Settlements and final court orders will be used as baselines from which the

Agency will conduct eligibility, reasonableness and necessity reviews.

A. Settlements

1. Owners/operators and third parties contemplating settlement should obtain DEQ advance determination of the amount of damages identified in the settlement total which will be eligible for disbursement.

2. DEQ will attempt to review the proposed settlement within ninety days from receipt of a completed third party claim.

3. For settlements, the owner/operator must demonstrate the basis of the owner/operator's liability to the third party and that the liability, if not certain, is at least fairly disputable. DEQ reserves the right to review all settlements for reasonableness.

B. Judgments

1. DEQ will attempt to review third party claims in which a judgment has been obtained against the owner/operator within ninety days of receipt of a completed third party claim.

2. Where the third party has obtained a judgment against the owner/operator for a relevant cause of action, the owner/operator need not demonstrate its liability to the third party.

C. Notice

Claim processing may be delayed or impaired if the owner/operator does not provide DEQ immediate notice of all relevant information, especially copies of all demands, pleadings, motions and other papers. The owner/operator bears the risk of any prejudice to the claim caused by delayed notification to DEQ.

D. Proof Requirements for Damages

The owner/operator must demonstrate that the damages for which it is submitting a claim are eligible for disbursement from the Fund consistent with State Water Control Law, 9 VAC 25-590-10 et seq. and the principles contained herein. The owner/operator also must demonstrate the amount of the damages and the basis for the damages.

E. Documentary Requirements

The owner/operator and third party must submit all documentation reasonably requested by DEQ. DEQ will discontinue third party claim processing and/or withhold payment if the owner/operator and/or third party refuse or fail to provide such reasonably requested documentation. Such documentation includes, but is not limited to: (1) waiver and/or release agreements; (2) subrogation agreements; (3) tax forms; (4) copies of real and personal property appraisals; (5) copies of personal property repair bills; (6) copies of medical bills; (7) financial statements; (8) lease agreements; (9) utility bills; and (10) pleadings and other documents of legal effect.

F. Physical Examination of Property

The Agency may require physical examination of property which is the subject of the settlement or judgment by a property appraiser or claims adjuster retained by the Agency.

G. Physical Examination of Person(s)

The Agency may require physical examination of the person(s) who is (are) the subject of the settlement or judgment by personnel retained by the Agency where bodily injury damages are claimed.

IX. Subrogation

Pursuant to Virginia Code § 62.1-44.34:11.F, the Board shall have the right of subrogation for moneys expended from the Fund as compensation for bodily injury or property damage against any person who is liable for such injury or damage.

X. Effective Date

These guidelines are effective as of February 12, 1998.


Director

2/12/98
Date